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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1956

No. 77

MOOG INDUSTRIES, INC.,
*Petitioner,*

v.

FEDERAL TRADE COMMISSION,
*Respondent.*

**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT**

BERNARD MELLITZ
MALCOLM I. FRANK
418 Olive Street
St. Louis 2, Missouri,

JAMES W. CASSEDY,
1001 Fifteenth Street, N. W.,
Washington 5, D. C.
*Attorneys for Petitioner*

MELLITZ & FRANK
*Of Counsel*

## INDEX


| | Page |
|---|---|
| Petition for Writ of Certiorari | 1 |
| Opinions Below | 1 |
| Jurisdiction | 2 |
| Questions Presented | 2 |
| Statutes Involved | 4 |
| Statement of Case | 4 |
| Reasons for Granting the Writ | 17 |
| Conclusion | 29 |

APPENDIX:

| | |
|---|---|
| Opinion of U. S. Court of Appeals for the Eighth Circuit | 1a |
| Judgment of Court of Appeals | 17a |
| Order denying motions of Petitioner for rehearing and to hold judgment in abeyance | 18a |
| Robinson-Patman Amendment to Clayton Act 15 U. S. C. 13(a) 49 Stat. 1526 | 19a |
| Administrative Procedure Act, 5 U. S. C. Section 1004(a) | 21a |


CITATIONS:


| | |
|---|---|
| A. E. Staley Co. v. Federal Trade Commission, 324 U. S. 746, 753, 65 S. Ct. 971, 975 (1945) | 17, 24 |
| Appalachian Coals v. United States, 228 U. S. 344, 360, 371, 53 S. Ct. 471, 478 (1933) | 17 |
| Automatic Canteen Co. v. Federal Trade Commission, 346 U. S. 61, 78, 73 S. Ct. 1017, 1026 (1953) | 22, 24 |
| Bruce's Juices v. American Can Co., 330 U. S. 743, 745, 67 S. Ct. 1015, 1016 (1947) | 20 |
| Butterick Co. v. Federal Trade Commission, 4 Fed. 2d. 910, 913 (2nd. Circ.) | 28 |
| C. E. Niehoff & Co. v. Federal Trade Commission #11526 (7th Circ.) Jan 9, 1957, not yet officially reported | 26, 27, 29 |

Page

Federal Trade Commission v. Biddle Purchasing Co. 117 F.2d 29 (1941) ..... 22
Indiana Quartered Oak Co. v. Federal Trade Commission, 58 F.2d. 183, 184 (2nd Circ.) ..... 28
International Shoe Co. v. Federal Trade Commission, 280 U. S. 291, 299, 50 S. Ct. 89, 91 (1930) ..... 18
Minneapolis Honeywell Regulator Co. v. Federal Trade Commission, 191 F.2d 786, 789, 790 (7th. Circ.) (1950) ..... 20
Morgan v. United States, 304 U. S. 1, 18-20, 58 S. Ct. 773, 776 (1938) ..... 21, 23
E. B. Muller & Co. v. Federal Trade Commission, 142 F.2d. 511, 519 (1944) ..... 24
Natural Gas Pipe Line Co. v. Federal Trade Commission, 58 F.2d. 183, 184 (7th Circ.) ..... 28
Pennsylvania R. R. Co. v. Chamberlain, 288 U. S. 333, 340, 341, 53 S. Ct. 391, 394 (1933) ..... 18
United States v. E. I. Dupont de Nemours & Co., 118 F. Supp. 41, 232 (1953) affirmed 351 U.S. 377 .... 19

STATUTES:

Section 2(a) of the Clayton Act 38 Stat. 730 as amended by Section 1 of the Robinson-Patman Act 49 Stat. 1526, 15 U. S. C. Section 13 (a) ....
Administrative Procedure Act 5 U. S. C. Section 1004 ..... 4, 23

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE 8TH CIRCUIT

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Your petitioner Moog Industries Inc. prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the 8th Circuit entered in the above entitled case on November 29, 1956.

### OPINIONS BELOW

The initial opinion and decision of the Hearing Examiner for the Federal Trade Commission appears in the printed record page 59. The opinion of the

Federal Trade Commission on Appeal from the Examiner's decision appears in the printed record at page 79. The opinion of the Court of Appeals is attached to the certified copy of the record and is reported at 238 F.2d. 43. Petitioner's motion to hold judgment and order in abeyance or for the Court to exercise its equitable jurisdiction is attached to the record and was denied by the Court of Appeals on November 29, 1956.

## JURISDICTION

The judgment of the Court of Appeals was entered on November 29, 1956 (attached to certified copy of record). Petitioner's Motion for Rehearing was denied November 29, 1956 (attached to certified copy of record). On Petitioner's Motion, issuance and transmittal of decree to Federal Trade Commission was ordered withheld by the Court of Appeals on December 17, 1956, for 30 days to permit petitioner to apply to Supreme Court for writ of certiorari and on Petitioner's Motion, the Court of Appeals entered its order on January 14, 1957, extending the time to apply for certiorari for 20 days from January 16, 1957 (attached to certified copy of record).

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

## QUESTIONS PRESENTED

1. In this price discrimination proceeding in which petitioner was charged with violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act, Title 15, Section 13, U. S. C. (see appendix), counsel for Federal Trade Commission introduced testimony and documentary evidence of the giving by petitioner of annual volume discounts

to competing customers according to a published table of discounts applicable to the annual volume purchased. No other testimony was introduced by the Federal Trade Commission, nor did counsel for the Federal Trade Commission produce any customer who testified that he had been injured by such practice. The petitioner introduced testimony from various large and small customers that they had not been competitively injured by the aforesaid volume discount practice. The counsel for Federal Trade Commission introduced no rebuttal evidence.

One of the questions presented is whether the mathematical price differences standing alone in the face of unimpeached and uncontradicted testimony by numerous customers of petitioner that no competitive injury had occurred to them, is sufficient under the statute to support a finding that petitioner was guilty of price discrimination, and that there was a reasonable probability of competitive injury to petitioner's customers.

2. Another question presented, is whether the petitioner was denied due process of law under the Fifth Amendment to the United States Constitution by the denial by the Federal Trade Commission of petitioner's Motion for a Bill of Particulars, when the complaint, itself, merely charged a violation of the statute in question in the general words used in statute and nothing more.

3. Another question presented is whether petitioner was denied due process of law under the Fifth Amendment to the United States Constitution by the Federal Trade Commission's denial of petitioner's Motion to elect typical transactions upon which the

Federal Trade Commission would rely from the great mass of statistical evidence covering several years' transactions over most of the United States.

4. Another question presented is that of the denial by the Court of Appeals of petitioner's Motion to Hold Its Judgment and Order in Abeyance or to exercise its equitable powers and original jurisdiction until its various numerous competitors who are using similar forms of volume discounts, which are standard in the industry, can be subjected to similar judgments and orders, since only two of its many competitors have been proceeded against similarly by the Federal Trade Commission; whether such denial by the Court of Appeals is inequitable, unjust and unfair when petitioner is subjected to the judgment and decree of the Court while its numerous competitors may still continue to offer volume discounts inevitably causing petitioner to suffer loss of business and consequent financial loss; and whether under such circumstances the Court should exercise its original equitable jurisdiction to protect the rights of petitioner.

## STATUTES INVOLVED

Section 2 (a) of the Clayton Act, 38 Stat. 730 as amended by Section 1 of the Robinson Patman Act, 49 Stat. 1526, 15 USC Section 13 (a).

Administrative Procedure Act, Title 5 USC Section 1004.

## STATEMENT

Federal Trade Commission issued a complaint against petitioner charging in the general terms of the statute that petitioner had discriminated in prices

between different purchasers and that such acts may be substantially to lessen competition, tend to create a monopoly, or injure, destroy, or prevent competition in violation of Subsection (a) of Section 2 of the Clayton Act as amended by the Robinson-Patman Act Title 15, USC Section 13, 49 Stat. 1526 (approved June 19, 1936) (R. 1) (Stat. as set forth in appendix). Thereafter, petitioner filed its motion for a bill of particulars (R. 5) which was denied (R. 6 and R. 16). Thereafter petitioner's amended answer was filed by leave specifically denying any violation of law as charged (R. 7). During the course of the hearing, petitioner's counsel moved the Hearing Examiner to require counsel for Commission to make typical elections from the great mass of statistical evidence covering transactions throughout the United States over a period of several years upon which they would rely (R. 415-420). This motion was denied (R. 25). Thereafter the Hearing Examiner filed his initial decision against petitioner (R. 59) and filed order against petitioner ordering it to cease and desist from price discrimination. The order appears at (R. 76). Thereafter on appeal the full Commission rendered its opinion affirming the decision of the Hearing Examiner (R. 79) and entered its final order against petitioner (R. 78). Commissioner Mason filed a dissenting opinion (R. 91). Thereafter petitioner filed its petition to review the order of the Federal Trade Commission with the United States Court of Appeals for the 8th Circuit (R. 100). Thereafter the Court of Appeals rendered its decision, affirming the order of the Federal Trade Commission, reported at 238 F. 2d 243, copy of which is attached to certified copy of record. Thereafter motion for re-

hearing was filed together with motion to hold order in abeyance (attached to certified copy of record) both of which motions were denied on November 29, 1956 (attached to certified copy of record).

In support of the complaint counsel for respondent introduced testimony of three officers of petitioner (R. 114, 126, 134, 154), four automotive replacement parts jobbers located at New Orleans, Louisiana (R. 182, 184, 186, 189), four automotive replacement parts jobbers located at Memphis, Tennessee (R. 191, 197, 200, 202), and one automotive replacement parts jobber located at Greenwood, Mississippi (R. 204), the president of a group of automotive parts jobbers (R. 192) and two Federal Trade Commission accountants (R. 207-221) together with numerous statistical exhibits showing total purchases of certain customers in various areas in a given year and the discounts received as well as lists of names of group buyers and the group to which they belonged and copies of various distributor contracts between petitioner and its customers. None of the automotive replacement parts jobbers called to testify by respondent, was asked by respondent's counsel as to whether he had been competitively injured by the pricing practices of petitioner. None of the commission's witnesses testified that he had lost money, or lost trade, or lost customers. There was no evidence of any price cutting by any purchasers, nor was there any testimony that one customer had lost business to another customer. Nor was there any testimony that any customer had been forced out of business. Practically all of the customer-witnesses testified that naturally they would like to buy at lower prices and

make more profit. The Commission placed no expert witnesses on the stand to show the effect, if any, on the market. There was no testimony adduced as to what type of parts were more marketable in one area than in another area or what makes of cars were used in one area more than in another. In short there was no testimony whatsoever on the market situation in any areas. The sum total of the Commission's witnesses' testimony was almost unanimously to the effect that the automobile manufacturers and automobile dealers were the jobbers' greatest and keenest competition and in certain areas that several of Moog's customers were in competition with each other.

Thereafter petitioner in its behalf introduced the testimony of three officers of petitioner (R. 247, 420, 499), the Secretary-Treasurer of an incorporated group of automotive replacements parts jobbers (R. 370), five automotive parts jobbers from Denver, Colorado (R. 272, 281, 294, 303, 310), four automotive parts jobbers from Dallas, Texas (R. 315, 321, 324, 326), three automotive parts jobbers from New Orleans, Louisiana (who had previously testified as Commission witnesses) (R. 329, 336, 340), two automotive parts jobbers from Memphis, Tennessee (one of whom had previously testified for respondent) (R. 348, 357), one automotive parts jobber from West Orange, New Jersey (R. 381), one from Brooklyn, New York (R. 387), one from New Brunswick, New Jersey (R. 400), and one from Newark, New Jersey (R. 381), together with certain exhibits showing various volume discounts offered by various other automotive replacement parts manufacturers. All of these jobber witnesses testified that

they had not been competitively injured by the pricing practices of petitioner. In addition counsel for the Commission conceded to and entered into a stipulation with counsel for petitioner that if additional jobbers were called upon to testify "their testimony would be the same as that of the witnesses previously called," to the effect that they had not been competitively injured or damaged by Moog's pricing system (R. 414).

Mr. Foster of Foster Auto Supply of Denver, Colorado, testified that he had lost no business to his larger competitors. Mr. Livonious of Western Spring Service Co. of Denver, whose company had received no volume discount, stated that he had not been injured competitively. He further stated that he wasn't always interested in buying at the cheapest prices; that he could buy a lot of items cheaper than he actually did buy them, but did not do so for his own reasons. He further testified that the larger jobbers in his own area did not cut into his business and that he even sells some of them (R. 283-285). Russell E. Faries of Empire Spring and Shock Absorber Service, Denver, who testified he had not been competitively injured, stated that he could buy similar products from others cheaper than he could from petitioner, but that he preferred petitioner because of the fine trade name that they have in the industry (R. 301). Mr. Henderson of Henderson Auto Parts, Dallas, Texas, testified that he had not been competitively injured, and that he preferred to carry a small inventory and have a less investment. Mr. Bardin of Auto Shock Absorber Sales Co., New Orleans, a small dealer who testified that he had not been competitively injured said that he preferred the

Moog line because they made good merchandise and that the name Moog was an asset to his business and when asked on cross-examination if he wasn't interested in buying an article at a cheaper net price, he said, "not necessarily so;" that he could buy from another jobber and let that jobber carry the cats and dogs and the large inventory and the large overhead (R. 333). Mr. Greiner of Greiner Auto Parts Co., New Orleans, who had previously testified as a witness for the Commission under subpoena and who testified he had not been competitively injured, stated that he turned his inventory five times; that he knew that he could buy quantities of Moog parts cheaper, but that it paid him to pay a little more to other jobbers (R. 339) and when cross-examined by counsel for the Commission as to a functional service performed by the jobbers as he had outlined, Commission counsel asked him this question —"You understand we are out to eliminate that?" and he answered, "You can't eliminate it, it is what the industry is built on." (R. 340). Mr. Williams of Truckstell Sales Co., Memphis, who testified he had not been competitively injured, stated that not a single one of his salesmen had reported a single instance of any complications caused by prices; that all of the stock that they had bought from Moog was sold and that they had no dead stock on hand (R. 363). Mr. Sapiro of Sapiro Auto Parts Co., New Brunswick, N. J., testified that he wasn't competitively injured; that there was plenty of business for everybody; and that he got his share of it and was not interested in what another firm paid for their merchandise (R. 400). Mr. Feaster of Wheels, Inc., Newark, New Jersey, testified that he had not been competitively injured and had suffered no reduction in his sales (R. 405).

Every one of these witnesses were jobbers, some with very large businesses and some with very small businesses. The Commission in its opinion cited Dallas, Texas, where six customers were sold who were in competition with each other (R. 83). At page 316, Mr. Bardin, General Manager, Automotive Appliances Co. of Dallas, stated he had not been injured by the pricing practices of petitioner. At page 325, Mr. Cook, President of Motor Supply Co. of Dallas, stated that he had not been injured by the pricing practices of petitioner. Mr. Henderson of Henderson Auto Parts of Dallas, a very small buisness, testified he had not been injured by the pricing practices of petitioner.

Petitioner, Moog Industries, Inc., has its principal office and manufacturing place in St. Louis, Missouri. It is in the business of manufacturing, selling and distributing automotive replacement parts to purchasers located in all States of the United States and the District of Columbia (R. 127-128). Some of the parts that it sells are purchased by petitioner for resale, the balance being manufactured in its own plant at St. Louis, Missouri (R. 129-442). It is now and for many years prior to and since the effective date of the Robinson-Patman Act (June 19, 1936), has been continuously engaged in this business and has been and is now engaged in competition with numerous other corporations, firms and individuals who are also manufacturing, selling and distributing similar automotive replacement parts in interstate commerce.

For volume discount purposes, Moog separates its various automotive replacement parts into three classifications or lines as follows:

(a) Coil Action Parts

(b) Leaf Springs, Coil Springs and Chassis Parts

(c) Piston Rings

The (a) Coil Action Parts line are all front end suspension parts and include threaded steel bushings, pins, seals, grease fittings, lock washers, bronze bushings, pivot shafts, stop nuts, rubber bushings, cotter pins, steering knuckle supports, threaded steel studs, welded upper control arm assemblies, shock links, coil spring spacers, Allen wrenches, rubberized coil spring silencers, A frame saddles, and repair kits of various front end parts for various yearly models. All of the above are for the various makes and yearly models of various types of passenger cars by yearly model starting with the 1937 year models. There are approximately 500 items included in this line and 260 types of repair kits (Comm. Ex. 15—Moog catalog) (R. 136).

The (b) Leaf Springs, Coil Springs, and Chassis Parts line include the following:

Approximately 3,300 types of complete leaf springs for passenger cars of various years, models and makes starting with the 1931 year models; approximately 7,000 types of complete leaf springs for trucks and buses from ½ ton up for the various years, makes and models. This gives a total of approximately 10,300 types of complete leaf springs, but does not include the individual leaves and component parts of springs. Individual leaves vary from 1 to 11 for each spring and these leaves are also sold by petitioner. This classification also includes approximately 100 types of U bolts, center bolts, approximately 120 types

of overload sets and buildup sets for various makes and models of cars starting with the year 1937, approximately 200 types of spring shackles, approximately 36 types of coil springs for various makes and models starting with the year 1935, approximately 1,350 chassis parts which consist of king bolts, kits and parts, tie rod ends, drag rings, and intermediate rods for various makes and yearly models of passenger cars, trucks, buses and axles starting with the 1928 yearly models (Comm. Ex. 15 — Moog Catalog) (R. 136, 267).

The (c) Piston Rings are composed of three different grades of piston ring sets which average five rings per set, the catalog listing approximately 1,950 sets for each grade or a total of 5,850 types of piston ring sets. These piston rings are for passenger car engines, truck engines, farm tractor engines, air-cooled engines, and industrial engines (Comm. Ex. 15 —Moog Catalog) (R. 136).

The above types of automotive replacement parts represent thousands of different items of varying design and function used in the repair and maintenance of many various makes and yearly models of automobiles and trucks.

Petitioner maintains a plan of retroactive volume discounts which it offers to every one of its customers which provides for annual volume discounts based upon the amount of annual purchases in any one of the above named three lines or classifications (R. 130, 157).

These discounts are as follows:

Coil Action Parts:

| New Purchases During Each Fiscal Year | Retroactive Rebate | Net Purchases During Each Fiscal Year | Retroactive Rebate |
|---|---|---|---|
| Under $1,000 | None | $15,000 to $17,499 | 14% |
| $ 1,000 to $ 4,999 | 5% | 17,500 to 19,999 | 15% |
| 5,000 to 7,499 | 7½% | 20,000 to 22,499 | 16% |
| 7,500 to 9,999 | 9% | 22,500 to 24,999 | 17% |
| 10,000 to 12,499 | 10% | 25,000 to 27,499 | 18% |
| 12,500 to 14,999 | 12% | 27,500 and over | 19% |

Piston Ring Line:

| New Purchases During Each Fiscal Year | Retroactive Rebate | Net Purchases During Each Fiscal Year | Retroactive Rebate |
|---|---|---|---|
| Under $2,000 | None | $ 9,000 to $ 9,999 | 13% |
| $ 2,000 to $ 2,999 | 2% | 10,000 to 11,999 | 14% |
| 3,000 to 3,999 | 5% | 12,000 to 14,999 | 15% |
| 4,000 to 4,999 | 7% | 15,000 to 17,999 | 16% |
| 5,000 to 5,999 | 9% | 18,000 to 20,999 | 17% |
| 6,000 to 6,999 | 10% | 21,000 to 24,999 | 18% |
| 7,000 to 7,999 | 11% | 25,000 to 29,999 | 19% |
| 8,000 to 8,999 | 12% | 30,000 and over | 20% |

Leaf Spring Line, Including Coil Springs and Chassis Parts:

| Net Purchases During Each Fiscal Year | Retroactive Rebate | Net Purchases During Each Fiscal Year | Retroactive Rebate |
|---|---|---|---|
| Under $1,000 | None | $11,000 to $14,999 | 11% |
| $ 1,000 to $ 2,999 | 5% | 15,000 to 19,999 | 12% |
| 3,000 to 4,999 | 7% | 20,000 to 27,499 | 13% |
| 5,000 to 7,999 | 9% | 27,500 to 34,999 | 14% |
| 8,000 to 10,999 | 10% | 35,000 and over | 15% |

(Comm. Ex. 1.) (R. 62, 63.)

These are offered by petitioner to all of its customers without exception through a distribution contract of which Commission Exhibit 1 is a typical example. In addition to the above volume discounts, petitioner allows to its distributors who stock its lines and resell to other jobbers a 10% warehousing and redistributing commission, provided the combined earnings of the

warehousing and redistributing commission plus the volume discount on any line in a given year do not exceed the earnings figured at the maximum rebate for that particular line (Comm. Ex. 2, R. 175). Every purchaser is granted and receives rebates according to the bracket applicable to his annual purchases. In addition petitioner allows to all its customers a uniform discount of 2% for cash payment by the 10th of the month following month of purchase (Comm. Ex. 1) (R. 421). Similar types of volume discounts or discounts in one form or another prevail throughout the entire automotive parts replacement industry (R. 426, 429, 436, 197, Resp. Ex. 10B-C, 16, 18-C, 25-A (typical examples)). When petitioner entered the piston ring field, it was general practice in the industry to grant cumulative rebates (R. 444, 130, 131, 458). Petitioner was compelled to use the volume rebates to meet competition in order to start in business in the replacement parts field (R. 445). This was evidenced by similar discounts offered by competitors as shown in respondent's exhibits showing these discounts (Resp. Ex. 6A, 12B). The large competitors who use similar pricing plans are Ramsey Corporation, Hastings Mfg. Co., Sealed Power Corp., McQuay-Norris and Perfect Circle Co. (R. 462, 500, 501).

The fiercest competition that petitioner's distributor meets in all phases is the car manufacturer through their car dealers (R. 464, 465).

All of petitioner's prices are published and are available to all their customers on the same equal terms (R. 430). It has only one type of customer which is a jobber and at times is referred to as a distributor (R. 129). Very few of their customers

carry petitioner's complete line. Some customers are piston ring specialists, buying only piston rings. Some are leaf spring specialists, buying only that line. Some are wheel alignment specialists (R. 441-443-444). A very few accounts are equipment manufacturers (R. 147-148) and pay the same price as other distributors (R. 157-158). A typical group account is Mid-South Distributors, who have 17 members (R. 193) who are jobbers (R. 194). It is a cooperative and its contract provides for a volume discount (R. 194). The members order on the Mid-South order blank in triplicate, one going to the manufacturer and one to Mid-South's office. Shipment is made direct to the member and petitioner invoices the order to Mid-South who is responsible for the payment (R. 194). When the discount rebate is received from petitioner by Mid-South, the expense of the group operation is deducted and then is distributed to the members in proportion to their purchases (R. 373, 374, 206).

Petitioner has no control of what the jobber does with his merchandise. He may resell it for whatsoever price he chooses (R. 442). All jobbers buy on what is called the blue price sheet (R. 471, Respondent's Exhibit 14). Various different colored price sheets showing suggested resale prices are given to jobbers who may, if they choose, in turn give certain ones to their customers for their use (R. 118-149-150-169). During 1947 to 1949, petitioner had approximately 1,200 Coil Action line accounts, about 800 Spring line accounts, and about 400 Piston Ring accounts. These figures include the group members counted individually (R. 167).

A Commission accountant testifying for the Commission stated that Commission exhibits 70A through 79G were made up from an examination of petitioner's ledgers and from compiled data made by petitioner (R. 221). He admitted he did not know how many items were in the Moog catalog after spending one month at petitioner's plant preparing the exhibits (R. 213-232). He admitted that he had examined only a few invoices, less than 289 in number (R. 232). He admitted that in making up these exhibits that he did not take into consideration that various makes of models and models of trucks, buses and passenger cars all use different replacement parts—that all he took into consideration was the total amount of the purchase and the rebate (R. 237).

The Court of Appeals held in effect that the mathematical differences were sufficient to sustain the order of the Federal Trade Commission to cease and desist in the face of unimpeached and uncontradicted testimony in rebuttal that no competitive injury had occurred, the Court holding that witnesses giving such testimony of non-injury were merely stating conclusions which could not prevail against mathematics.

The Court of Appeals further held that petitioner was not denied due process of law by the denial by the Federal Trade Commission of Petitioner's Motion for a Bill of Particulars.

The Court of Appeals further held that petitioner was not denied due process of law by the Federal Trade Commission's denial of Petitioner's Motion to elect typical transactions upon which the Federal Trade Commission would rely from the great mass of

statistical evidence covering several years transactions over most of the United States.

The Court of Appeals further denied Petitioner's Motion to hold its judgment and order in abeyance or to exercise its equitable powers and original jurisdiction until various numerous competitors who are using similar forms of volume discounts which are standard in the industry might be subjected to similar judgments and orders, as only two of its many competitors have been proceeded against similarly by the Federal Trade Commission.

## REASONS FOR GRANTING THE WRIT

### I.

The Court of Appeals in effect held that the mathematical price differences standing alone in the face of unimpeached and uncontradicted testimony by petitioner's customers that they had not suffered competitive injury by reason of the volume discounts was sufficient to support the finding of the Commission. Such ruling is in square conflict with the opinion of the Supreme Court in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61, 78 (1953), in which the Court held that the ordinary rules of evidence applied in Robinson-Patman Act proceedings.

The ruling of the Court of Appeals is in direct conflict with *Appalachian Coals* v. *United States,* 288 U. S. 344 (1933), in which elaborate statistics were introduced by the government and the defendant introduced numerous competing witnesses who testified the proposed action would not hurt their business; the government offered no opposing testimony as to

the effect of the proposed operation and the Court held that the government had failed to support its case by substantial evidence.

The ruling of the Court of Appeals is in direct conflict with *International Shoe Co.* v. *Federal Trade Commission,* 280 U. S. 291; 299 (1930), where experienced business witnesses were put on by International Shoe Co. who denied the competitive effect alleged by the government and no rebuttal witnesses were put on by the government. The Court held that thereby the Federal Trade Commission had failed to support its decision and order by *substantial evidence.*

The ruling of the Court of Appeals is contrary to *Pennsylvania Railroad* v. *Chamberlain,* 288 U. S. 333, 340, 341, wherein the Supreme Court held that the existence of a fact which must be inferred from other facts cannot exist when testimony appears contrary to the inferred fact.

In the instant case, numerous jobber witnesses, both large and small, all of them being hardheaded practical businessmen with years of experience, testified that they had not been injured by the volume discount practice of the petitioner. In addition, counsel for Federal Trade Commission entered into a stipulation with petitioner that future jobber witnesses, if called, would testify that they had not suffered competitive injury because of such practice (R. 414). The Court below stated that such testimony by all of the aforesaid witnesses was a mere conclusion on their part and that witnesses could not by conclusion deny a mathematical fact. The Court in effect says it has better knowledge of the business

than the jobbers themselves. Such a statement by the Court is contrary to the aforesaid decisions of this Court because all of the opposing witnesses to the government in the cited cases were the same type of hardheaded practical experienced business men who testified from their own intimate knowledge and experience as in the instant case; the testimony of those witnesses in the above cited cases was not a conclusion and the Court so ruled; in the instant case, the Court of Appeals by ruling otherwise with identical experienced witnesses has ruled contrary to the aforesaid decisions. In addition such statement by the Court ignores the very language of the statute which requires evidence of the competitive effects of the difference in prices. It takes more than a difference in price to constitute a violation under the Act. There must be in addition the consequent competitive effects mentioned in the statute, but the Court below, as we have mentioned above, has ignored this requirement of the statute. One of the most recent cases illustrating this very point is that of *United States* v. *E. I. Dupont De Nemours & Co.*, 118 F. Supp. 41, 232 (1953), affirmed 351 U. S. 377, where the District Court said:

> "To reach inferences which the plaintiff seeks this Court to draw from its selected use of documentary materials, would necessitate a determination by this Court that the testimony of these witnesses was false."

In that case the District Court dismissed the anti-trust action refusing to infer competitive injury under the Robinson-Patman Act from the bare evidence of price differentials.

In addition the Court below in the instant case surprisingly held that the Commission's findings were not based upon non-permissible inference, but upon proven facts and inferences to be properly drawn therefrom. It must be noted that the Court fails to state what these proven facts are. In any event whatever proven facts the Court referred to, from the record it is evident they were either isolated, trivial or sporadic, which Courts have held not to be substantial evidence. The facts proven by the Federal Trade Commission were the volume discounts which petitioner admitted, that many of the customers were in competition with each other, and some of them testified they would like to make more profit. Such proof and the inferences therefrom are not substantial evidence upon which to base reasonable probability of competitive injury. Selling at quantity discounts to competing purchasers is not enough—otherwise Congress would not have used the words in the statute "where the effect of such discrimination may be substantially to * * * lessen * * * or to injure * * * competition." *Bruce's Juices* v. *American Can Co.*, 330 U. S. 743, 745 (1947). The facts proven in a price discrimination case must be such that there is a reasonable probability of injury to competition and such facts are not in the instant case. In fact on this very point in *Minneapolis Honeywell Regulator Co.* v. *Federal Trade Commission*, 191 F. 2d 786, 689, 790 (7th Cir.), Cert. dismissed, 348 U. S. 806 (1954), the Court refused to affirm the price discrimination order. The ruling in the instant case is in conflict with the 7th Circuit on this point. We respectfully submit that there is no substantial evidence whatsoever in the record on

the part of the government to support the order made. The important question to be determined is whether or not the giving of volume discounts alone is sufficient to warrant a decree of price discrimination by the Federal Trade Commission. So far as counsel can find, this is the first time that this Court has been asked to rule upon this question. In all other price discrimination cases initiated by the Federal Trade Commission that have reached this Court, the Federal Trade Commission in each and every instance showed actual competitive injury by competent testimony. This is a point which this Court should clarify inasmuch as the Court of Appeals has thereby departed from the accepted and usual course and rulings on substantial evidence that have heretofore prevailed in judicial proceedings.

## II.

The complaint filed by the Federal Trade Commission (R. 1 and 2) merely charged the petitioner with a violation of the statute in question in the general words used in the statute and alleged nothing more. A Motion for a bill of particulars was filed by petitioner (R. 5) and denied (R. 6 and 16). Under such circumstances, such ruling is a denial of due process and in direct conflict with the ruling of the Supreme Court in *Morgan* v. *United States,* 304 U. S. 1, 18-20 (1938). The holding in that case with particular respect to quasi judicial proceedings uses this language:

> "Those brought into contest with the government in a quasi judicial proceedings aimed at the control of their activities are entitled to be fairly advised of what the government proposes and be

heard upon its proposals before it issues its final command."

The Federal Trade Commission and the Court of Appeals both have disregarded this fundamental requirement of fairness which is the essence of due process. The denial of the motion for a bill of particulars and its affirmance by the Court of Appeals in its opinion is in direct conflict with the holding of this Court in *Automatic Canteen Co.* v. *Federal Trade Commission,* 346 U. S. 61, 81. In that case the Federal Trade Commission was criticized for its use of general terms in respect to what the Supreme Court had to review. The Court through Mr. Justice Frankfurter saying:

> "* * * since we are charged with the duty of reviewing the correctness of the standards which the commission applies and the essential fairness of the mode by which it reaches its conclusions, that the Commission do not shelter behind uncritical generalities or looseness of expression as to make it essentially impossible for us to determine what really lay behind the conclusions which we are to review."

If the Supreme Court was thus kept in the dark by the Commission's use of generalities, it is certainly necessary in the spirit of judicial fairness that the defendant in a case brought against him by the Federal Trade Commission should be advised in some particularity as to what he has to meet.

In the 2nd Circuit in *Federal Trade Commission* v. *Biddle Purchasing Co.,* 113 F. 2nd 29 (1941), the Court on this very point stated that a bill of particulars should be granted to the extent of at least

requiring the Commission to particularize at least one typical transaction, sufficiently to inform the respondent of the nature of the acts claimed to violate the order. Therefore the holding of the Court below, as well as of the Federal Trade Commission is contrary to the holding of the 2nd Circuit. The Court below circumvented this argument by stating that it was apparent on the first day of the hearing that the Commission was relying upon the price discriminatory effect of petitioner's cumulative annual rebate plan as the sole source of the price discriminations found. Unfortunately, the Court below has overlooked the fact that the statute requires more than just proof of price discrimination alone. In such a case, there must be some evidence of some particular act as to time and place that has the required effect set out by the statute. Thereby your petitioner has been deprived of due process of law; in addition there has been a direct violation of the Administrative Procedure Act (Title 5 U.S.C. Sec. 1004(a)) which was passed to provide such due process of law; and we differ from the opinion of the Court below that a reading of the first day's proceedings "made it apparent" upon what the Commission would solely rely.

## III.

During the course of the hearing petitioner's counsel moved the Hearing Examiner to require counsel for Commission to make typical elections from the great mass of statistical evidence throughout the United States over a period of several years upon which they would rely (R. 415-420). This motion was denied (R. 420). There was thereby

placed upon petitioner an insurmountable burden of analyzing and breaking down this great mass of evidence which would require thousands of man-hours by high-priced accountants and would involve exorbitant and needless expenses far beyond petitioner's financial ability to meet or to pay. The denial of this motion constituted a denial of due process of law under the 5th Amendment to our Constitution and is directly contrary to the pronouncement of the Supreme Court in *A. E. Staley* v. *Federal Trade Commission,* 324 U. S. 746, 753 (1945), wherein the Court stated that the statute placed emphasis upon individual competitive situations rather than upon a general system of competition. The action of the Commission and of the Court below in denying a motion to elect is directly contrary to the opinion of the Court in the 6th Circuit in *E. B. Mueller & Co.* v. *Federal Trade Commission,* 142 F. 2d 511, 519 (1944), the 6th Circuit saying that since the statute imposed upon petitioner the burden of rebutting a prima facie case, the Commission's counsel should in fairness have specified the individual or group transactions which it claimed constituted unlawful discrimination. It is interesting to note that in the *Automatic Canteen Co.* v. *Federal Trade Commission,* supra, the Federal Trade Commission introduced seventy-five particular situations, and counsel for the Commission was criticized by the Commission for introducing so many typical situations and so burdening the record, saying that not more than five such situations would have been ample. In the Commission's brief in the Supreme Court in that case, Mr. Dawkins, Assistant General Counsel of the Commission, represented to the court that

> "Petitioner refers to the numerous discriminations and sellers involved; as to this it could have moved the Commission to elect a limited number of instances upon which it would rely (see page 18 of the Commission's brief in that case.)"

Again in that same brief to the Supreme Court, Commission counsel states

> "* * * could have moved the Commission to elect a limited number of instances upon which it would relay and thus greatly reduce the scope of the defense necessary."

It is interesting to note that counsel for petitioner in the instant case did exactly what Commission's counsel in its brief in the *Automatic Canteen* case argued should have been done. Thereby the Commission's counsel itself has admitted by its brief in that case that petitioner's motion to elect is proper under similar circumstances. In order to be consistent, the Commission must agree with petitioner's contention herein. Fundamental requirements of fairness, which is the essence of due process were violated and thereby the ruling of the Court below is contrary to *Morgan* v. *United States*, 304 U. S. 1, 18-20 (1938).

## IV.

After the Court of Appeals had rendered its opinion affirming the order of the Commission, your petitioner filed a motion to hold the judgment and order in abeyance or to exercise its equitable powers therein for the protection of petitioner.

The record shows that numerous of the competitors of petitioner used similar volume discount practices

and that it is standard practice in the industry (R. 426, R. 444). The record further shows the names of a few of these competitors from the large ones down to the smaller ones approximating the size of petitioner. Some of these appear at pages 451, 462, 471, 472, 475, 477, 500 and 501 of the record, such as Maremount Automotive Products Tuthill Spring Co., Ramsey Corporation, Hastings Manufacturing Co., Sealed Power Corporation, McQuay Norris Co., Perfect Circle Corporation, Chevrolet, Mopar Chrysler, Regal Tool & Mfg. Co., Hershey Metal Products, Thompson Products. Typical contracts of some of the above companies showing volume discounts are Regal Tool & Mfg. Co., Thompson Products and McQuay-Norris Co., Respondents Exhibit 10-B & C, p. 1538B, Respondents Exhibit 16, p. 1582-1583, Respondents Exhibit 25A, p. 1867. Your petitioner sells less than one per cent (1%) of the total sales in the automotive replacement parts industry (R. 430), the 1952 volume of the industry being two and one-half billion dollars (R. 431). So far as counsel is advised, the Federal Trade Commission has proceeded against only two of petitioners competitors in this industry. To subject your petitioner to the order of Federal Trade Commission and leave the great bulk of the industry free to continue volume discounts is inequitable and unfair and can only inevitably result in loss of business to petitioner and consequent financial loss. This identical situation under practically identical facts arose in the case of *C. E. Nichoff & Co.* v. *Federal Trade Commission*, #11526, in the 7th Circuit which was decided on January 9, 1957, not yet officially reported. In that case the court affirmed the Commission's order to cease and desist from price dis-

crimination, and then when a similar situation such as we have outlined above was stated by the Court, it further held:

> "It thus appears that the order against Niehoff was entered at a time when the Commission had acted against only a few of this firm's competitors. ' We are persuaded * * * in view of the lapse of time which is inevitably involved in proceedings before the Commission, Niehoff's business will suffer economic extinction before the commission adjudicates upon trade practices of Niehoff's competition which in their purpose and effect are essentially similar to those condemned in the Niehoff order. This result will follow, if Niehoff is required by elimination of its present selling methods to charge higher prices for its products than the price charged by its competitors against whom the Commission has not yet ruled."

The Court then held that it had the power to modify an order of the Commission and had original jurisdiction to protect the rights of the parties in any manner in which a trial court of equity of general jurisdiction might do in an injunction suit. The Court then modified the Commission's order to cease and desist by adding these words to the order:

> "This cease and desist order shall take effect at such time in the future as the United States Court of Appeals for the 7th Circuit may direct, sua sponte, or upon motion of the Federal Trade Commission."

As thus modified, the 7th Circuit then affirmed the order of the Commission.

The Court of Appeals for the 8th Circuit in the instant case refused to hold the order in abeyance

or to exercise its equitable jurisdiction as prayed; thereby its holding is contrary to the 7th Circuit in the above case.

In addition the ruling of the Court below on this point is contrary to the ruling of the Court in the 7th Circuit in *Natural Gas Pipeline Co.* v. *Federal Power Commission,* 128 F. 2d 481, 484, which cites in support several Federal Trade Commission cases.

The ruling of the Court of Appeals below in this respect is contrary to the ruling of the Court in the 2nd Circuit in *Indiana Quartered Oak Co.* v. *Federal Trade Commission,* 58 F. 2d 183, 184, wherein the Court held that it had original jurisdiction to modify orders of the Commission where equity demands such an action, since otherwise—

> "* * * it places it in a position where it would be unable to fairly compete with its competitors. Under these circumstances this court should act and will do so. An order will therefore be entered by this Court modifying the order of affirmance directing petitioner to cease and desist, so that petitioner will be permitted to use the term 'Philippine Mahogany' * * *"

In the 2nd Circuit in *Butterick Co.* v. *Federal Trade Commission,* 4 F. 2d 910, 913, the Court expressed itself in a similiar way. Since the Court of Appeals for the 8th Circuit in the instant case has ruled contrary to and in conflict with the Courts of Appeals of other Circuits in identical situations, it is submitted that this Court should grant certiorari and rule upon this highly important question of vital interest not alone to petitioner, but to the general public and the automotive replacement parts industry in general.

In addition, the Court in the *Niehoff* case, supra, stated that they did not agree with the Commission's contention that the Court of Appeals was judicially impotent in such a situation, and then went on to state its position and ruling as noted above. The actual effect of such denial by the 8th Circuit Court of Appeals to hold the order in abeyance, or to modify it, places petitioner in a decidedly unfavorable position competitively and in effect denies it equal protection of the laws. Under such conditions, the very purpose of the Robinson-Patman Act to protect small competitors such as petitioner would be defeated.

## CONCLUSION

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

BERNARD MELLITZ
MALCOLM I. FRANK
418 Olive Street
St. Louis 2, Missouri,

JAMES W. CASSEDY,
1001 Fifteenth Street, N. W.,
Washington 5, D. C.
*Attorneys for Petitioner*

MELLITZ & FRANK
*Of Counsel*